Did International Law really become a Science at the End of the 19th Century ?

Introduction

I have chosen this title because of my familiarity with the projects at the Max Planck Institute for European Legal History (MPIeR) on the history of international law which was supported by the Deutsche Forschungsgemeinschaft (DFG) since Michael Stolleis put forward a bid in 1997; a new MPIeR-project on "Theory and Practice of International Law, 1789–1914" has started in 2007 in the context of the DFG-funded Frankfurt Cluster of Excellence "The Formation of Normative Orders" and was one of the cooperation-partners of the Lecce conference in 2009. The introductory program of this conference says that "international law as a legal discipline and a scientific knowledge was born in the 19th century … the process through which the international law became a science, different from the diplomacy or the natural law started only in the second half of the 19th century".

The program states that the alternatives at that time were "a confused philosophy or a simple comment of the diplomatic practice". The discipline required the positivisation of the law, with the states as the subjects of new knowledge, but still having to seek general principles necessary for a world wide legal science. It was not possible for international law to be a science and also be merely a product of the will of states. In particular international law science had to mediate between universalism and nationalism and maybe humanitarian aspirations and colonial impulses etc.

International lawyers were to develop an organic relationship with the conscience of civilized nations, as an elite group of intellectuals but at the same time international law would be a positive law based on the conscience of humanity, and expressed by public opinion. The role of the international lawyers was "to interrogate the conscience".

The program of this last paragraph corresponds very much to the manifesto of the *Institut de Droit International* set up in 1873[1] and it does

1 See in particular, Martti Koskenniemi, *The Gentle Civilizer of Nations,* Cambridge: Cambridge University Press, 2002 for a full account of this event,

not exactly correspond to the first paragraph which is closer to a summary of the issues which dominated German and Austrian international law doctrine in the years before the First World War.[2] Obvious differences are that the state does not figure in the last paragraph, while the former is dominated by the question of the state, effectively as an expression of organized nationalism and the problems that poses for universalism and the possibility of an objective law above the will of the state.

The fourth paragraph of the first page of the *conference aims* does foreclose the outcome of the conference deliberations because it stipulates that the objective is "to understand how international law has become a science during the mid-nineteenth century". The organizers want to be as liberal as possible in inviting the participants to develop this agenda and have happily accepted a title from myself, which has the pretension to challenge this objective by asking whether there is anything very usefully achieved by saying that international law has become a science.

A difficulty in taking up such a challenge surrounds the concept of "science" itself. It is presumably a translation of the German word *Wissenschaft*. One might go for an Italian title of the conference, which is, presumably, literally translated into English, "the construction of a

chapter 1, 39 et seq. See also, the author's "Changing Models of the International System", in: William Butler (ed.), *Perestroika and International Law*, The Hague: Kluwer 1990, 13–40, and also, by the author, *The Philosophy of International Law,* Edinburgh: Edinburgh University Press 2007, at 50–59. I argue that Habermas's theory of communicative action might be used to revitalize the Institute's project, while Koskenniemi is more skeptical in the light of the events of the 20th century.

2 This is a huge subject which is only beginning to be researched seriously. Apart from Koskenniemi (n. 1), see in particular the work of Lauri Mälksoo, The Science of International law and the Concept of Politics. The Arguments and Lives of the International Law Professors at the University of Dorpat/Tartu 1855–1985, in: *BYIL* 76 (2005) 283 and id., The Context of International Legal Arguments. Positivist International law Scholar August von Bulmerincq (1822–1890) and his Concept of Politics, in: *JHIL* 7 (2005) 181. The argument of the present paper will continue to be the one first advanced by the author in *The Decay of International Law*, Manchester: Manchester University Press 1986, that the discipline gradually lost any sense of its cultural roots in European traditions and became an unintelligent and ultimately unintelligible repetition of phrases which were losing their meaning. See further, in the same sense, the author's, The Evolution of International Legal Scholarship in Germany during the Kaiserreich and the Weimarer Republik (1871–1933), in: *GYIL* 50 (2007) 29–90. See also for a reflection on this process as a wider phenomenon, James Boyd White, *When Words Lose Their Meaning. Constitutions and Reconstitutions of Language and Community,* Chicago: University of Chicago Press 1984.

discipline". A literal translation of *Wissenschaft* is probably the creation of knowledge, through something approaching the idea of a discipline, which is an organized pursuit of the same, through teaching and research of new knowledge, by means of appropriate methods, meaning those accepted by the discipline. The word "science" in English may possibly be taken to denote particularly the empirically verifiable rigor that is supposed to attach to the natural sciences.

However, the program is probably to be taken to be rather more historically specific than these general definitions might suggest. It has contrasted the discipline with "confused philosophy" and "simple comment of the diplomatic practice". Later when the program is discussing options for contributors it returns to what it calls the fractures that mark the relationship between the project of the scientification of international law and *the other discourses still tied to diplomatic practice or the natural law.* It concludes the paragraph, again in the same essentially prescriptive terms of the conference, with what may be a single proposition, since it begins with the word "finally", but which may equally denote three tasks, since the propositions are broken with semi-colons, while also beginning after a semi-colon:

> "and finally, reconstruct the 'positivist turn' that characterizes also international law from the last decades of the nineteenth century; what were the sources of this discipline, oscillating between law, philosophy and politics? How about its autonomy?"

These last propositions leave very much open the possibility that, while there was a positivist turn, put in inverted commas by the organizers, presumably to signify that they recognize it to be a contested concept, *the discipline to be* still oscillated between law, a word which is not put in inverted commas, and so is presumably not a contested concept, philosophy – which was earlier designated as inherently confused, at least as practiced by presumably dilettante or otherwise unscientific *would be* international lawyers – and politics. The last if not final – since we have already had the word "final" at the beginning – question is then whether international law is autonomous. Presumably this last question follows from concerns about the oscillation identified in the previous proposition.

I think that it is probably uncontested that normally the heralding of international law as a science in the late 19th century is taken to mean the routing of natural law, its elimination from thinking about international law. Natural law has become *the other* for international lawyers. However, the conference program itself suggests, as we have just seen, that this objective was not achieved or maybe not even achievable. Therefore, the question arises whether there might be another way to describe the remarkable changes that

were taking place in the late 19th century. I would suggest that what "Geschichte der Völkerrechtswissenschaft" should really be taken to signify is the professionalization of international law. This has a special and independent significance which may or may not run parallel to the attempts by the "positivist turn" of international law to exterminate its *other, natural law* or to distance itself from its equally odious ties to *diplomatic practice*.

The idea of professionalization, in the original project on "Wissenschaftsgeschichte des Völkerrechts vom Kaiserreich bis zum Nationalsozialismus" at the Max Planck Institute for European Legal History,[3] will mean that very significant developments in international law can themselves be attributable to the way that the profession of international lawyers is itself organized. Therefore the discipline of international law needs also to be understood in terms of how that discipline is organized. It is not enough to look to the relationship between international law writings and general political events and general cultural or more specifically philosophical currents in international society. As long as the project has this additional aim and does not itself claim any exclusive goal as to what has to be, in the end, the fundamental character of international law – I will characterize any such ambition as ideological, as such a word is taken to denote a negative attempt to give an exclusive ideational foundation for something – I think it has to be recognized that the project makes a fascinating addition to our knowledge of international law. In particular it offers a radar screen into the minefields of the discipline, which allows those wishing to make a career in international law – the very essence of professionalization – to see what the hazards are they have to face as they choose to give the discipline their own particular mark.

I propose to illustrate both the usefulness of the project, and, simultaneously, the futility of expecting it to produce a single ideological result in the sense which I have just defined. I will do this, to use the language of academic disciplines, by offering no more than what is understood as a review article of two books, doctoral dissertations, which have been produced from, or in open dialogic association with, the project. They are Frank Bodendiek, *Walther Schückings Konzeption der internationalen Ordnung. Dogmatische Strukturen und ideengeschichtliche Bedeutung*[4] and Jochen von Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler.*[5]

3 "Wissenschaftsgeschichte des Völkerrechts vom Kaiserreich bis zum Nationalsozialismus", as prepared by Michael Stolleis for the Deutsche Forschungsgemeinschaft (DFG) in 1996.

4 Berlin: Duncker & Humblot 2001.

5 Baden-Baden: Nomos Verlagsgesellschaft 2001.

Where an intellectual activity ceases to be the work of solitary, even self-supporting *literati*, and acquires at least some of the character of routinized, or even institutionalized study, that is bound to have some influence on the character of the intellectual activity, one could even ask how the hated and despised *others* of international law, philosophy and diplomatic history were changed in the late 19th century as they equally experienced the effects of the expansion of university education in the context of the consolidation of the European nation-states after 1870. Is the core of an intellectual activity significantly affected by having to transmit aspects of it to a defined audience of an inherently generational character, such as a student community? Can one generalize about whether this type of activity affects the content of the discipline? Clearly people have to be trained to be recognizable as teachers of the discipline and this means, again, that criteria of excellence common to the profession have to be worked out. However, could one seriously argue that disciplines such as philosophy, history etc., are fundamentally altered by the multiplication of centers of state funded university knowledge production and transmission?

I think the answer has to be positive to some degree at least at particular points in time – which do not exclude evolution – so that one has an agreed content of intellectual activity that has to be in some measure routinized. So it is worthwhile exploring how professionalism could lead, above all, to the neglect of the "rough edges" of a discipline, to disregard of intrinsic and apparently interminable controversies in favor of simple presentation of practical matters, which are seen by society as immediately pressing. To some degree this reflects the difficulties which Schücking experienced in his career. Yet one has to explore at the same time how it is that, also in purely career terms, he emerged at the very top of his profession. A crucial question is posed through a reflection on Schücking's life, in the context of the present conference. It is whether and how career and institutional constraints affected his research methods. With Kelsen, it is perhaps enlightening to see all of his intellectual endeavors as determined by the fact that he thought he had to do with international law only as a university discipline. His desire to dominate this particular environment and force it into a single mode gains some intelligibility in that context.

Walther Schücking

The particular fascination of Bodendiek's academic biography of Schücking in the present context is his description of how Schücking's intellectual methods and objects brought him into serious conflict with aspects of his national institutional environment, but did not prevent his eventual success, both at

home and abroad, at least until the Nazis assumption of power ended any national activity. The essential points of Bodendiek's work are that he can rely upon extensive private papers and correspondence, the networking activities of Schücking, the records of his university time in Marburg, at a Commercial College in Berlin, the records of the German Society of International Law and those of the Ministries of Education in Prussia, to piece together his fortunes.

He was recognized as an outstanding legal scholar from the very beginning. However, he did suffer some career difficulties because he differed from many of his German law colleagues about the appropriate type of academic activity in which to engage. After the founding of the German Reich in 1871, it was thought, following the positivist school of Paul Laband, the proper function of the university public law professor was to delineate exactly what was the state and identify what it had promulgated as law. To treat this material logically and systematically was the most important to do for the university teacher. International law as a specific discipline was, in any case, usually only a small part of the teaching and research responsibility of German public law professors, which remains the case today.

Schücking did not disagree in principle with the basic tenet of this positivist school. However, he thought that by the beginning of the 20th century Germany and the world were experiencing such rapid change that such an approach for the academic lawyer as mere description of existing legislation was too passive and did not exhaust his wider responsibility to society. Schücking drew a very critical picture of the academic who remained in his study (Fachgelehrte) and lost contact with real life.[6] Looking outside the Law Faculty in Marburg, his first Chair, to the need for a close exchange between politics and Wissenschaft which should engage with contemporary political problems, he relied upon the intellectual support of the neo-Kantian philosophers in the same university, which was a leading centre for this essentially liberal German philosophical movement. At the same time his Law colleagues reacted by blocking the establishment of an International Law Seminar in Marburg because they disapproved of his activities. These could include him being seen as connected to his brave public stance in denouncing Prussian government expropriations of Polish landed interests in the province of Posen.[7] Schücking was a solitary figure among German public law professors in making this protest.

6 Bodendiek, Walther Schückings Konzeption der internationalen Ordnung (n. 4), 118 et seq.

7 Ibid., 51.

At the theoretical level Schücking's basic thesis, following Stammler, was that the rapidly changing and conflictual political environment needed the lawyer to work with a concept of justice, which would connect natural law with the historicity of law, thereby restoring the connection between law and philosophy.

Schücking could not see the point of any intellectual method, whether legal positivism or historicism, which simply served to describe, with whatever accuracy, what had actually happened, when the challenge was in fact to cope with rapid and potentially dangerous change.[8]

It was obvious that very little of international society was regulated in the usual public law sense by positive international law. However, the potential for serious conflict in the last decade of the 19th and first decade of the 20th century was great and increasing. Schücking did not work out a fully developed philosophical system, but he felt a strong affinity to an idealist republicanism which he took from Kant. An especially important party of this heritage was the belief in the power of ideas and the belief that history was a dynamic historical process, in which the challenge was to recognize and harness the elements working positively for change.[9] To manage change peacefully one needed a concept of justice to balance and reconcile difference and one needed agreement on the principle of peaceful settlement of disputes, hence the importance of arbitration and exclusion of the use of force by states. It was precisely because factual change was so fast and threatening that the lawyers needed constantly to be coming up with new models and frameworks to feed into the political process, with which they had to work constantly and closely.

This was an unusual perspective for a lawyer to adopt and Bodendiek notes that even as a enlightened colleague as Franz von Liszt did not agree with him. Von Liszt thought the main function of the legal academic was expository and the thinking out of new laws was the responsibility of the legislator. Legal science should just record the legal practice.[10] Pohl, Heilborn and others also disagreed with Schücking. Legal doctrine should present legal facts, engage in a constructive systematic analysis of them and conclude with a description of what states were now willing to regard as valid against them in their relations with other states.[11] These jurists were positivists who were not neo-Hegelians and did not dispute the legal character of international law. This was not a

8 Ibid., Das wissenschaftliche Selbstverständnis Schückings, at 117–125, esp. 122–123.
9 Ibid., 119.
10 Ibid., 137.
11 Ibid., 138.

dispute between nationalists and cosmopolitans, but had to do precisely with the nature of the intellectual responsibility of the *Fachgelehrten*.

Bodendiek explains Schücking's unusual stance among his colleagues partially in terms of his family background.[12] He came from a literary family, of artistic creativity which meant, in Bodendiek's view, Schücking would not have been lacking in the necessary amount of fantasy to be able to risk playing with new types of concepts. The family itself was liberal and opposed to Bismarck. He was educated by the left liberal Ludwig von Bar[13] and while he quickly became isolated from the rest of the Law Faculty in Marburg, he had plenty of intellectual and social support from the equally left liberal neo-Kantianism of the University as a whole and of the town of Marburg. Perhaps hostility within the Faculty encouraged Schücking to look outside the university. His very general commitment to the Kantian tendency of German idealism included a belief that challenges had to made specifically to the intellectual elites of Germany (*die geistigen Eliten*) to bring in a new era.[14] To achieve this he constantly quoted Kant. His belief in history as a dynamic historical process did not amount to a fully worked out position on philosophical questions.[15] However, the absence of so much needed regulation of international society necessitated something more than a strict legal method. One had to think in terms of the organization of the world and that required, in Schücking's view (and it is central to Bodendiek's thesis about him) the profession to be able to imagine things quite differently from how they are now – one has to come out of the swamp of the past into the heights of the future. There is need for a modern international law, not in an unalterable form as with Grotius but one coming out of the nature of things (*Natur der Sache*). One had to look to a changeable natural law (Stammler), to the ideas of pacifism (the origin of the idea that the world had to be organized), as well as to imaginative reworking of the valid international law institutions, such as came out of the Hague Conferences.[16]

What I wish to stress is not so much the details of Schücking's arguments as the contexts in which he presented them and the fortunes they enjoyed.[17] Peace in the world is only going to come through a juridification of international relations. In a Kantian sense, some legal conception of international

12 Ibid., 44–45.
13 Ibid., 48–49, with whom Schücking did his Habilitation in 1899 and started as a Privatdozent with von Bar in Göttingen.
14 Ibid., 116 et seq.
15 Ibid., 119.
16 Ibid., 126–128.
17 Ibid., 156 et seq.

order is a condition of peace and freedom. So the central question is how to use law as a means to prevent future wars. This requires a republican organization of the world. This tended to drive Schücking to advocate and claim there already existed – through the results of the Hague Conference – a world confederation of states – based upon mutual compromise, recognizing that the national idea was a strong as the idea of freedom and could not be eradicated. Republicanism excludes individual state hegemony, but does not try to rob states of their individuality. Instead, there are ordered relations on the basis of equal rights. There had to be acculturation to compromise and a command of law over war. Because of the strength of the national the solution to conflict has to be a reconciliation of the national with the international. Instead of a hegemonic leveling of difference, one has to retain respect for national difference.

One has to convince people that the idea of state sovereignty has changed its function. It is no longer necessary to protect communities from the Kaiser and the Pope, but instead it should function as a legal competence which communities possess to develop legal relations. However, treaties and arbitration are not enough.[18] One needs more to stop wars, a comprehensive legal "Genossenschaft" which encompasses all states in their whole existence, actively building trust and making the outbreak of war less likely – a world confederation of states.

Schücking built up his reputation shortly before the outbreak of the First World War with his major work in 1908, *The Organization of the World*. He openly acknowledged that the idea was coming from the pacifist movement and particularly the work of Alfred H. Fried.[19] Schücking's ambition was to add legal rigor and technical detail to general pacifist ideas. This led him to offer analyses of the Hague Conference results, especially on arbitration, as a budding confederation of states. His colleagues did not go along with his analysis either as a description of confederation or as an ideal.

However, things changed with the outbreak of the First World War. With all of his public campaigning and controversialism, Schücking was a national and soon to be international figure.[20] During the war he wrote texts for the Chancellor Bethman Hollweg, such as *Freedom of the Seas in Exchange for Peace Guarantees,* part of his philosophy that the war was pointless and that a compromise peace without annexations should be concluded. He was invited by the German Society of International Law to help draft a proposal

18 Ibid., 165.
19 Ibid., 188.
20 Ibid., 88–115 for the paragraph following.

for a league of states, when by now virtually all German international lawyers had come around to agree with him that a confederation of states was necessary. He went on to jointly write a commentary on the League Covent, which even the most conservative of German international lawyers, Philip Zorn praised for its ability to put its democratic and pacifist views to one side in favour of proper juridical analysis. Yet Schücking opposed the Versailles Treaty as not being a compromise peace – meaning a peace based upon mutual understanding. By the late 1920s he had decided that the League Covenant was a failure, because the idea of a confederation was not strong enough to cope with the hegemonic presence of France and Britain. These developments show how Schücking sought, with considerable success, to influence the higher political echelons of his country and how he gradually brought them with him. International legal discourse should be a central part of the discourse of a democratic country's place in world society.

A final note should concentrate on the precise consequences of these activities for his career. In 1918 his work on *International Legal Guarantees,* on how to build a confederation among states, attracted the attention of Secretary of State, Matthias Erzberger in the last liberal government of the Empire headed by Max von Baden. He publicly acknowledged to making a close study of it. [21] The German Government and its Foreign Office Legal Advisers drew on the study in 1919 for their proposal to the Versailles Peace Conference. Yet in 1919 the support of Erzberger and the SPD in the Prussian Landtag etc. were not enough to achieve Schücking's appointment to a Chair in Berlin. The Faculty rejected him officially on the ground that he lacked "wissenschaftliche" qualifications. The Culture minister, Becker argued also that one needed someone with the best competence in public law, which included administrative law and church law.[22] Schücking took instead a job at a commercial college where he could teach no international law to law students. Several years later he left Berlin for Kiel in 1926. Yet, during his time in Berlin he was a member of the Reichstag and on the committee concerned with publication of the archives of the war and also with considering the question of German war guilt. He represented the unpopular view that Germany shared responsibility for the outbreak of the war.[23]

At an international level his reputation was by now outstanding. In 1921 he was made an ordinary, i. e. full member of the Institute of International

21 Ibid., 195 et seq.
22 Ibid., 66–67.
23 See Anthony Carty, The Evolution of International legal Scholarship in Germany during the Kaiserreich and the Weimarer republic (1871–1933), in: *GYIL* 50 (2007) 29, at 75–81.

Law, where there were only two other Germans. He was the German ad hoc judge of the PCIJ in the *Wimbledon Case* and the *Schools in Upper Silesia Dispute*. In 1926 he was appointed to the *Kuratorium* (board of trustees) of the Hague Academy, becoming the German judge on the PCIJ in 1930.[24]

As a brief, provisional conclusion to this part of my paper I would remark that Schücking's story qualifies for a very broad pleading for a definition of professionalism which is not merely interdisciplinary as to method, but which connects the academic profession directly with the wider political community. Schücking's efforts at this wider level were, ultimately, extremely successful, but it may be that he lost out at the narrower level of establishing a place for his methods and goals within the Law Faculties. The latter not only resisted his ideas. They also blocked him for most of his career from any effective teaching of new generations of students, including those who might have become his disciplines and carried on his message. He left no definitive textbook or monograph about international legal methodology, which could have had a lasting influence on the Law Faculties and, despite his fame, he does not enjoy a prominent place in German international law science, as distinct from the impact, if ultimately transitory and marginal, that he had on Germany's approaches to world governance.

Hans Kelsen

Perhaps the ambitions of Hans Kelsen correspond most closely to the idea of a "positivist turn" which has as its primary aim the "Verwissenschaftlichung" of the discipline of international law. I think von Bernstorff's critical exposition of Kelsen's thoughts helps to show the strengths, and, *in my view,* the circularity not only of this exercise but also of something which has grown out of it at the present time, what I would call the liberal constitutionalist movement in international law. Kelsen's aims, in von Bernstorff's exposition, have to be seen primarily in an academic context. They are a response to a nationalist sentiment in Germany and also, eventually, Austria Hungary, which would treat the sovereignty of the state, as the institutionalized nation, above any, in Kelsen's view, objective legal standard. International law was nothing more than external public law, always likely to be trumped by appeals to the supreme national interest or whatever other label, be it vital interests, inherent sovereignty.[25] The public lawyer in the university who might regard

24 Bodendiek, Walter Schückings Konzeption der internationalen Ordnung (n. 4), 72–73.

25 Von Bernstorff, Der Glaube an das universale Recht (n. 5) 4–5, 25 et seq, esp. 37 considering Georg Jellinek and Heinrich Triepel, also 51–52 et seq.

himself as the "wizard" of this mythical *Apollo* worshipped as the State, would try to appeal to a hotchpotch of political and ethical prejudices to judge quite capriciously when this trumping should take place. So it is possible to see, as von Bernstorff presents him, Kelsen as primarily engaged with the social reality of institutionalized, state-directed learning in the form of the university professor of public law. It was crucial to follow up what was happening in educational institutions, where future generations were being trained to see the State as a necessary block on excessive attempts at constructions of an international society.

Von Bernstorff stresses the Austro-Hungarian context of the model of law, whether public or international, that Kelsen wished to develop. His country was obviously not nationally homogenous, but instead a multi-ethnic, multi-religious, simply pluralist world, which it was appropriate to govern with a culturally neutral concept of law as a rule issued by a delegated authority, for the purpose of the most flexible possible form of social engineering. No possibilities of development, particularly towards international organization, should be *a priori* excluded. Since Kelsen's context, unlike Schücking's, is entirely the forum of university education, his desire is to ensure that generations of future officials in state-run educational institutions, acquire as a central feature of their education, a professional responsibility to remain politically, ethically or otherwise in terms of whatever *weltanschaulich* neutral, and simply accept responsibility for the implementation of law.

While Kelsen insisted absolutely upon the autonomy of law, his was not a normative theory in the sense that he believed laws could or should contain so much detail that they could be automatically applied to factual situations. Instead his governing ideas were those of a hierarchy of delegation of authority of decision-making, ideally suited for those who were to become functionaries in administration, at whatever level.[26] This theory was known among Austro-Hungarian administrative lawyers as a *Stufenbau-Lehre,* the concept of law as a hierarchical ladder. In formal terms the traditional concept of sovereignty meant that point or stage which could not be said to be themselves derived from any point or stage above it. Logically every hierarchy had to have such a point, but equally logically, it could not itself have its authority derived from within the hierarchy. One had to suppose, or hypothesize a meta-systemic point which somehow validated the hierarchical order. With this, admittedly very serious qualification, Kelsen thought it possible to talk of the sovereignty of the Law.

26 Ibid., at 71 et seq., also 145 et seq.

Kelsen was not alone among German speaking public lawyers in his search for an objective standard for the specific problem for public lawyers posed by the need for those of an internationalist or cosmopolitan tendency, to ground securing the existence of international law beyond the caprices of the turn of the 19th and 20th century European nation-state. Jellinek, Triepel and others came up with doctrines of "Selbstverpflichtungslehre" and "Vereinbarungstheorie" to counter the neo-Hegelian – for instance held by the so-called *Bonner Schule* led by Philipp Zorn, that a State could change its will with respect to an obligation if supreme national interest required it.[27] In developing responses to these arguments Kelsen can only be understood in terms of "Wissenschaftsgeschichte". At no point does Kelsen engage, as Schücking does, with the actual tensions of international society and with questions of what forms of national passion or conflicts of interest could lead to war. Instead, Kelsen is concerned to develop a critique of his own academic colleagues which conforms to what he sees as necessary for the development of an appropriate – i.e. political prejudice free – concept of Law.

While Jellinek, Triepel, and indeed Schücking may have had the same ideological orientation as Kelsen – and von Bernstorff stresses at the beginning of his book, the possibility of a tension between the Pure Theory of law and Kelsen's own undoubted political orientation – Kelsen sees their theories as still caught up in too close association with the State considered factually rather than legally. Yet, in Kelsen's view, as interpreted by von Bernstorff, any attempt to view the state in a supposedly sociological way, opens the door to the crass identification of the public lawyer, through his political prejudices, with the projection of the nation-state as an ethnically homogenous Leviathan whose collectivist lusts have to be satisfied. So it is impossible to ask, with Jellinek, whereabouts in the collective mass psychology of the State one was to find empirical evidence of the process of "Selbstverpflichtung". Kelsen's argument here was to have serious implications for his view of the subjective element of the usual definition of general customary international law. He was also opposed to Triepel's combination of two such collective entities self-obliging wills into the fusion of an international "Vereinbarung", as something more than mere contracts among individual states. The theory was a mere fictional transfer to international relations, of Rousseau's political theory of the *Contrat Social.*

Instead, in Kelsen's view, one had to go to the root of the problem, the anthropomorphic concept of the state as a super-human collective, a later day

27 Ibid., discussed very lucidly by VON BERNSTORFF (n. 5) at 22–36. On Zorn, see also JULIA SCHMIDT, *Konservative Staatsrechtslehre und Friedenspolitik. Leben und Werk Philipp Zorns,* Ebelsbach: Aktiv Druck & Verlag GmbH 2001.

Apollo, of such a mythical, irrational power, that no intellectual, never mind emotional, resistance to it was conceivable. This social reality had to be exercised from legal science. Kelsen's solution was simply to insist that primary legal subjects of international law were those entities to which the international legal order directly addressed its norms. The State is therefore that entity within a particular geographical space to which the unified, and therefore international, hierarchy of norms delegates certain competences which it, in turn, delegates to entities subordinate to it, regional authorities or the judiciary, to take two examples.[28]

In that case where was the top of the hierarchy of legal norms? Kelsen has already decided that the inevitable problem of the infinite regress of authority through ever rising levels of delegation, is to be overcome with the hypothesis of the *Grundnorm*. The question for international law is to choose such a norm. Kelsen latched onto the idea that *pacta sunt servanda* is an objective norm of the international legal order which has a status distinct from the status of particular rules of law about the conclusion of agreements. He describes this rule in terms that states behave customarily as if the rule *pacta sunt servanda* is to be observed. This makes out of the rule somehow a command standing above the will of individual states which they have to obey because they are subordinate to it. The essential idea of Law as objective to Kelsen means that it has the character of a command, and there represents a reality which it is beyond the possibility for an individual legal subject to please itself whether it will continue to accept as an obligation something it consented to freely at one point in time.[29]

Kelsen himself is aware that there is a contradiction driving his whole theory, which rests in his own cosmopolitan or internationalist preferences as against what he takes to be subjectivist nationalist prejudice. As he is committed to the idea of the unity of all legal orders in one, he feels compelled to explain exactly the relationship of the national to the international in terms of his theory of delegation. As an international lawyer, he has no difficulty claiming that *pacta sunt servanda* is the supreme norm and that somewhere down the hierarchy states, as primary subjects of international law, have norms of that order addressed to them directly. However, he accepts that it also possible for each individual state, assuming for the sake of argument that

28 Ibid, 44–47, and esp. 49–52 and to 64, 138–141 et seq. see also, Anthony Carty, Interwar German Theories of International Law. The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt, in: *Cardozo Law Review* 16 (1995) 1235 et seq.

29 See also Anthony Carty, The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law, in: *EJIL* 9 (1998) 344.

one can talk of such things, regards itself as constituting the final *Grundnorm,* so that all other state legal orders and the international legal order can be taken as delegated from itself. Kelsen expects this idea to be regarded as absurd. So, he is effectively intending to compel people to accept the internationalist *Grundnorm* as the more reasonable. [30]

I believe that the idea of the *Grundnorm* has not itself proved to be the problem with Kelsen's theory. Indeed it makes it especially attractive to the whole idea of professionalism, which requires that the would-be professional person need only be concerned with the internal limits and integrity of what he or she is doing. Professionalism does not require the individual to have, as it were, the whole picture, i.e. not merely a grasp of the discipline but also of its actual soc-political role and its relation to other disciplines. He is simply concerned with the internalization of the requirements of his own field. The *Grundnorm* can serve as a more abstract version of H.L.A. Hart's so-called *internal perspective* on the Law. The officials applying the Law think, as officials, that they are applying rules which they ought to apply. This perspective is contrasted with the so-called external perspective, for instance, of the criminal or the uncultivated foreigner, who can merely see patterns of behavior of officials, which may produce results serving certain persons' material interests, but to which no normative force is attributed. For those within the profession the external perspective does not matter as long as the system continues to function.[31] It is probably not possible to criticize professionalism head on. It feeds the needs of security of modern society that for every problem there can be found people who "know what needs doing" because they are "experts". The presentation of Schücking's approach to international law was intended to challenge this perspective.[32]

However, it is possible to challenge Kelsen in other ways. I will point to at least three. Von Bernstorff challenges the fetish which Kelsen is inevitably making out of the three letter word which is Law. In the true spirit of the discipline of Wissenschaftsgeschichte, he shows that Kelsen is in fact relying

30 Von Bernstorff, Der Glaube an das universale Recht (n. 5), 41 et seq, a theme developed especially in *Das Problem der Souveränität und die Theorie des Völkerrechts*, Tübingen: Mohr 1920, 2nd ed. 1928.

31 See H.L.A. Hart, *The Concept of Law,* Oxford: Oxford University Press 1961, and a comment thereon from a critical legal perspective in Anthony Carty, Philosophy of International Law (n. 1), at esp. 80–81, 200–201.

32 Legal positivism was challenged after 1945 by very revered figures such as Gustav Radbruch. See his *Rechtsphilosophie,* ed. Erik Wolf and Hans-Peter Schneider, Stuttgart: K.F. Koehler 1973, and especially, Anhang Nr. 4 Gesetzliches Unrecht und übergesetzliches Recht, at 339–350 (published first in 1946).

upon a whole erudition in international law literature, which in fact belongs to the period of supposedly confused philosophy. Kelsen's idea of the essential unity of Law is a natural law idea which he has taken from the late Spanish scholastics. Indeed one of his first works is on Dante Allegre's vision of the cosmos. So Kelsen's vision of what can be achieved through the neutrality of Law is a spiritual one rooted in the European tradition that sees in Law, as a three letter word with the first letter as a capital, a force which presumably Kelsen himself would have to admit is mythical, although von Bernstorff simply says that the idea is of a natural law character, which presumably means it has an objectively constraining force beyond the supposedly inevitably arbitrary nature of individual choices or decisions. Von Bernstorff shows in convincing detail, particularly from his discussion of Kelsen's 1922 work *Das Problem der Souveränität und die Theorie des Völkerrechts,* that Kelsen draws very closely in a number of respects from Wolff's theory of the *Civitas Maxima* and from von Kaltenborn's *Kritik des Völkerrechts,* published in 1847. The former is precisely the international order which Kelsen thinks has to be logically posited as a necessary logical framework to ensure the coordinated of the freedom of independent states. The latter provides the whole vocabulary of the subjective and the objective in the relations of individual states with international society. Von Kaltenborn believes that the subjective and the objective are reconciled in a single cosmic whole. It is these visions which infuse the spirit of the idealism which Kelsen attaches to the concept of Law. In other words the dichotomy between the philosophical and the professional is historical false. There is no rupture, only a change of language and style.[33]

One aspect of the natural law tradition which Kelsen draws upon, specifically through von Kaltenborn's *Kritik,* is the just war theory. Kelsen uses this specifically to distinguish the purely legal character of norms. This comes from the presence of a sanction. The Law stipulates that in specific circumstances (Tatsbestände) a sanctioning norm applies. The legal sanction distinguishes law from morality or the politically desirable. Such a sanction also exists in international law, through the decentralized system of sanctions represented by reprisals. This argument of Kelsen revives the just war theory, going back to Grotius and the Scholastics, because it harnesses the use of force to responses to prior legal violations, and to repression of or punishment of

33 Von Bernstorff, Der Glaube an das universale Recht (n. 5), at 16–18, 69–74 et seq., also 99–103, esp. at 102. Von Bernstorff also shows the affinity of Kelsen with his explicitly Roman Catholic colleague in Vienna, Alfred Verdross.

these violations.[34] In the absence of compulsory adjudication, which Kelsen favored, his whole line of argument is open to all the traditional positivist objections about the subjectivity of sovereign state assessments of the nature or extent of legal violations. In his later writings in the 1950s Kelsen recognized this.[35]

I wish to conclude with a critique of Kelsen's approach to the state. Triepel, Morgenthau and Arangio Ruiz have all pointed out that it makes no sense to talk of the international legal order delegating legal competence or authority to the state, if the factual reality is that the state precedes international society. The word "precedes" may appear to some to be masquerading as sociological or historical term, when it is in fact metaphysical – and so, supposedly ephemeral- but these authors are simply asking for historical evidence as to what point in time an international society granted anything to a state, and whether that society really continues to be able to impose anything upon a state. Kelsen's own definition of what international law accepts as the state in fact gives away any argument he might have – for instance from constructivist theory – that state and international society mutually constitute one another.[36] He accepts that a state is, for the purpose of international law, any entity which through revolution or a coup, reaches power and establishes effective control over a territory and a population. This acceptance of Jellinek's famous *Drei-Elemente-Lehre* is an endorsement of classical positivism's doctrine of the *juridical power of the factual.* It is "Wissenschaftsgeschichte" which can expose how Kelsen, having set himself a meta-legal goal in the realm of legal theory, then develops it in particular branches of so-called legal science, such as international law, by simply adopting *lock, stock and barrel*, existing concepts and dressing them up in his new language.[37]

However, Kelsen is genuinely hostile to the turn of the 20th century state and its public law priests and I think this has finally implications for aspects of

34 Ibid., at 75–78 et seq.

35 See Carty, Philosophy of International Law (n. 1), 117–123, discussing Hans Kelsen, *Collective Security under International Law*, Washington: Government Printing Office 1954.

36 The standard work on this debate is probably Alexander Wendt, *Social Theory of International Politics*, Cambridge: Cambridge University Press 1999.

37 See the sociological critique of Hans Morgenthau, Kelsen's one time student, *La realité des normes, en particulier des norms du droit international*, Paris: Librairie Felix Alcan 1934. See also Carty, The Decay of International Law (n. 2), 16–18 for a discussion of G. Arangio-Ruiz.

the sources of international law and particularly for any hope of a vibrant relationship between international law and the second *other* of the scientification of international law, diplomatic practice. Kelsen has systematically rejected in his analysis of Jellinek's work, what he regards as the sociological theory of the state. As von Bernstorff points out, Kelsen's primary fear is the public international lawyer as pseudo-intellectual, bringing his own confused prejudices about the ethics of politics to bear on evaluations of the behavior of his own or other national states. Kelsen wishes to exclude the possibility of evaluation of state practice by international lawyers. He excludes the subjective element from the definition of general customary international law. He also excludes as speculative and subjective the notion of general customary law resting upon tacit or implied consent of states. All such notions allow unreliable evaluations by so-called outstanding international law publicists. Instead, Kelsen insists that the international judiciary should be accorded the sole authority to declare what is customary international law. He believes himself confirmed that the World Court does not provide evidences of the subjective element of *opinio juris*. In other words, Kelsen carries his loathing for his academic colleagues in the German-Austrian university world to the point where he abolishes the whole idea of *Völkerrechtswissenschaft* and with it, the whole idea that international law somehow evolves out of the practice of states. Instead, we have to accept the task of legal science as being that of analyzing the law making jurisprudence of the World Court.[38]

Kelsen contradicts the self-understanding of positive international lawyers, as enshrined in the Statute of the ICJ, article 38. The practice of states accepted as law, is the primary source of international law, which the ICJ has repeatedly insisted, must include the subjective element of *opinio juris*. However, this is not the primary point I wish to make. My feeling is that there is real genius in Kelsen in managing to incorporate in elegant language how the overwhelming majority of the international law profession see themselves, as a profession, commentators on judicial practice. I think Kelsen does somehow brilliantly encapsulate the present mood of the profession. However, that should serve, in my view, to justify taking him as a focal point for questioning the present prejudices of the profession, and above all, its excuses for intellectual laziness for which Kelsen's above all rhetorical brilliance serves as an alibi. I think there is no reason to make Kelsen's

38 Von Bernstorff, Der Glaube an das universale Recht (n. 5), 145–151. Later in the 1950s Kelsen recognized that the absence of compulsory international adjudication presented a serious difficulty for his project of international law, see note 35 supra.

anxieties about the character of Germanic nationalism in Hitler's Vienna and Munich as a fetish, *for all time*, to remove intelligible understanding of the relationships of national communities with one another and with an overarching concept of international community. It might also be added that Kelsen's own immersion in neo-Kantian and more particularly Wittgensteinian logical positivist critique of the objective possibilities of ethics are not to be taken to have frozen endeavours in this area *for all time*. To accept Kelsen's philosophical theories as eternally valid is just one more mark of the intellectual laziness of the profession, a laziness of which he was never susceptible. Forays into the worlds of diplomacy and ethics were considered reasonable and possible undertakings by Kelsen's own mentor von Kaltenborn, and also by his equally worthy contemporary, Schücking. However, if one accepts that challenge, then one is once again, as an international lawyer, thrown out of the supposedly pure world of law as an autonomous discipline. That pure world gives a spurious identity to an independent, because parasitical, profession – mere commentators on judicial and other institutional decisions. The international lawyer is thrown back into the murky worlds of diplomatic history and ethics in international relations. In any event the meta-juridical character of the state comes back to haunt and deconstruct state centered international law and all that it creates.[39]

Conclusion

My very brief conclusion to this survey of the contributions of Bodendiek and von Bernstorff to *Völkerrechtswissenschaftsgeschichte* is that the history of how international legal arguments develop within the institutions of the discipline is an essential element in an understanding of international law. However, it is only one element in the way of understanding the subject. As for the intellectual content of the discipline, its methods, ideals and tasks, I believe these two examples or illustrations demonstrate that international law is, like every other human endeavor, going around in circles. At present, the profession is inclined to fantasize its existence in the terms of Kelsen's elegant rhetoric, but I believe that the increasing power of critical international legal studies and of the so-called new scholarship in international law points the way to a renewed immersion of the profession in the murky interdisciplinary worlds of diplomatic politics, international ethics and perhaps even political

39 See, Anthony Carty, International Law, in: Duncan Bell (ed.), *Ethics and World Politics*, Oxford: Oxford University Press 2010, 274–291.

theology. This is, after all, where international law began in the 16th and 17th centuries.

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